

D.T.E. 04-92

Investigation by the Department of Telecommunications and Energy on its own motion regarding circumstances under which an electric company must seek Department approval pursuant to G.L. c. 164, § 72 prior to transmission line construction or alteration.

ORDER OPENING NOTICE OF INQUIRY

I. INTRODUCTION

G.L. c. 164, § 72 (“Section 72”) provides for the preconstruction review and approval by the Department of Telecommunications and Energy (“Department”) of proposed electric transmission lines and alterations to such lines. In recent months, several transmission providers have inquired as to whether specific real or hypothetical transmission projects require Section 72 approval. To date, the Department has responded to such inquiries on a case by case basis. However, in light of the increasing number of transmission projects being undertaken within the Commonwealth, and the existing confusion as to when Section 72 approval is required, the Department concludes that it would be administratively efficient to issue general guidelines for determining when Section 72 applies. In addition, the Department intends to provide guidance as to the necessary content of a petition filed under Section 72. Before issuing such guidelines, the Department seeks comments to gain a better understanding of how the regulated community currently interprets Section 72 and their filing responsibilities thereunder.

II. G.L. C. 164, SECTION 72

G.L. c. 164, § 72, as amended by Chapter 249 of the Acts of 2004,¹ provides that:

(a) Any electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the [D]epartment for authority to construct and use or to continue to use as constructed or with altered construction a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it, and shall represent that such line will or does serve the public convenience and is consistent with the public interest The [D]epartment, after notice and a public hearing in one or more of the towns

¹ Governor Romney signed Chapter 249 of the Acts of 2004 into law on August 2, 2004. The amendments to G.L. c. 164, § 72 made therein take effect on November 1, 2004.

affected, may determine that said line is necessary for the purpose alleged, and will serve the public convenience and is consistent with the public interest. If the electric company, distribution company, generation company or transmission company or any other entity providing or seeking to provide transmission service shall file with the [D]epartment a map or plan of the transmission line showing the towns through which it will or does pass, the public ways, railroads, railways, navigable streams and tide waters in the town named in said petition which it will cross, and the extent to which it will be located upon private land or upon, under or along public ways and places, the [D]epartment . . . may by order authorize an electric company distribution company, generation company, or transmission company or any other entity to take by eminent domain under chapter 79 such lands, or such rights of way or widenings thereof, or other easements therein necessary for the construction and use or continued use as constructed or with altered construction of such line along the route prescribed in the order of the [D]epartment.

The Department recently has received inquiries from a number of companies as to whether certain specific projects would trigger review under Section 72.² The statute does not establish length, voltage, or other threshold requirements for Department review. A review of 69 orders issued under Section 72 between 1960 and 2004 shows that the Department has reviewed transmission lines ranging from approximately 200 feet to 32 miles in length, and from 23 kV to 345 kV, but reveals no clear pattern for determining which types of projects trigger Section 72 review.

² Historically, there have been differences of opinion as to whether G.L. c. 164, §72 requires that a company seek Department approval to construct any new transmission line, or whether the Department's approval is necessary only when an eminent domain taking is necessary for such construction. The Supreme Judicial Court ("Court") addressed this issue in Town of Sudbury v. Department of Public Utilities, 343 Mass. 428 (1962) ("Sudbury"), and Boston Edison Co. v. Town of Sudbury, 356 Mass. 406 (1969) ("BECO"). In the latter case, the Court stated that the legislative history permits a broad interpretation of Section 72 -- namely, that Section 72 approval is a condition precedent to any new or substantially changed transmission line. BECO, 356 Mass. 406, 416. Since that time, the Department has expected companies to seek Department approval under G.L. c. 164, § 72 regardless of whether they expect a particular transmission line to require an eminent domain taking.

III. REQUEST FOR COMMENTS

The Department anticipates developing guidelines to govern the circumstances under which Section 72 approvals must be obtained. In addition to any general comments you may have, the Department requests that you address the following issues:

A. Nature of Transmission Lines Subject to Section 72

Section 72 provides for the review of “a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it”

1. Does this language encompass all types of transmission lines that a transmission provider might construct, or are certain types of lines (for example, substation tap lines) excluded from this definition? Please explain.
2. Section 72 appears to distinguish between “a line for the transmission of electricity” and other electric lines. Are the Department’s two orders distinguishing transmission and distribution facilities in response to FERC Order 888 (Classification of Transmission and Distribution Facilities, D.T.E. 97-93 (1998), and Western Massachusetts Electric Company, D.T.E. 03-71 (2004)) relevant to the question of which electric lines are subject to Section 72? Can you propose a clear formula that would distinguish transmission lines subject to Section 72 from distribution lines that would not be subject to Section 72?
3. From a policy perspective, are there voltage, length or other considerations that should dictate when a Section 72 filing is required? If so, please explain.
4. Could the Department exempt certain types or lengths of electric transmission lines from Section 72 review, while retaining the ability to authorize the taking of property by eminent domain for a certain line of that type or length, if necessary? If so, please explain.
5. For transmission providers: What factors do you consider when deciding whether to seek Section 72 approval for a new transmission line? Why do you consider these factors? Have these factors changed over time, or have you historically relied on these factors in deciding whether to seek Section 72 approval of new

transmission projects?

5. For transmission providers: What voltage levels are used in your service territory: (a) for the transmission of electricity for distribution in some definite area; (b) for supplying electricity to yourself or to another electric company or to a municipal lighting plant for distribution and sale; and (c) for transmission of electricity to a railroad, street railway or electric railroad, for the purpose of operating it? Are there instances in which any of the same voltage levels also are used for lines in your service territory that are clearly distribution circuits only?
6. For transmission providers with recent experience in Section 72 reviews: Please provide an estimate of the incremental expenses incurred when a transmission project requires a Section 72 review.

B. Transmission Lines with Altered Construction

Section 72 states, in part, that “[a]ny electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the [D]epartment for authority to . . . continue to use as constructed or with altered construction a line for the transmission of electricity”

1. Should this language be read as requiring companies to seek Section 72 approval for alterations to certain transmission lines, where eminent domain is not required for such alterations? If so, what types of alterations might require Section 72 approval, and what types should be considered routine maintenance, not requiring such approval?
2. For transmission providers: Have you ever sought Section 72 approval for alterations to an existing transmission line, except in the context of an eminent domain filing? If so, please provide recent examples. What factors do you consider when deciding whether to seek such approval? Why do you consider these factors? Are there other factors you think should be considered, going forward?
3. For transmission providers: Approximately how many additional Section 72 filings would you make annually if Section 72 approval were required for all reconductoring of electric transmission lines? For reconductoring that required the replacement or relocations of a significant number of poles? For reconductoring that required replacement or relocation of all poles? For the relocation of a transmission line outside of the existing right-of-way?

C. Scope of Section 72 Proceeding

1. Attached to this Request for Comments is a draft checklist, similar to the checklist used for zoning exemptions, which outlines the information that should be submitted as part of a Section 72 filing. Does the checklist accurately convey the scope of current Department proceedings with respect to Section 72 reviews? If not, what should be changed to accurately convey that scope? Would you recommend any changes to the current scope of the Section 72 review?
2. As discussed above, there have been differences of opinion in the past as to whether G.L. c. 164, § 72 requires that a company seek Department approval to construct any new transmission line, or whether the Department's approval is necessary only when an eminent domain taking is necessary for such construction. Given the Court's holdings in Sudbury and BECo, and the amendments to G.L. c. 164, § 72 adopted as part of Chapter 249 of the Acts of 2004, is it still possible to argue that Department approval should be required only when an eminent domain taking is necessary for the construction of a transmission line? If so, please explain.

IV. PROCEDURES

Any person with an interest in the matters discussed above is invited to submit written comments to the Department at the address listed below by November 30, 2004. Comments also should be submitted to the Department in electronic format using one of the following methods:

(1) by e-mail attachment to dte.efiling@state.ma.us; or (2) on a 3.5" disk, IBM-compatible format. The text of the e-mail or the disk label must specify: (1) the docket number of this proceeding (D.T.E. 04-92); (2) the name of the person or company submitting the comments; and (3) a brief descriptive title of the document. The electronic filing should also include the name, title and telephone number of a person to contact in the event of questions about the filing. Text comments should be written in either Word Perfect (naming the document with a ".wpd" suffix), in Microsoft Word (naming the document with a ".doc" suffix), or as an Adobe PDF file (naming the document with a ".pdf" suffix). Data or spread sheet attachments should be compatible with

Microsoft Excel. One original and 10 copies of all comments should be filed with Mary L. Cottrell, Secretary, Department of Telecommunications and Energy, One South Station, Boston, Massachusetts, 02110. A copy of the comments will be available for public inspection and/or purchase at the Department's offices during business hours. In addition, all comments submitted in electronic format will be posted on the Department's Website, <http://www.mass.gov/dte>.

After reviewing the submitted responses, the Department may convene a technical session hold hearings, or request additional comments in order to gather any additional information it needs to provide useful guidance to electric companies.

Any person desiring further information regarding this Notice may contact the Hearing Officer at the address or telephone number below:

Kathryn Sedor, Hearing Officer
Department of Telecommunications and Energy
One South Station
Boston, MA 02110
617-305-3525

V. ORDER

Accordingly, the Department hereby

VOTES: To open an inquiry in order to establish guidelines regarding circumstances under which an electric company must seek Department approval pursuant to G.L. c. 164, § 72 prior to transmission line construction or alteration; and it is

ORDERED: That the Secretary of the Department shall serve a copy of this Order on each electric transmission and distribution company organized and doing business in Massachusetts by first class mail.

By Order of the Department:

Paul G. Afonso, Chairman

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner